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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 602

FLETA A. JONES,

Petitioner

vs.

AETNA CASUALTY & SURETY COMPANY,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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MAY IT PLEASE THE COURT:

It is submitted that there are three fundamental bases for the Court to deny the present application for writs. They are:

(1) Petitioner failed to raise the issue sought to be reviewed by this Court in accordance with law;

(2) The petition for writs asks for a review of the decision of the wrong Court;

(3) The contention of petitioner is void of merit.

I.

Petitioner seeks to have declared illegal the present method of trial by jury in civil cases in the State of Louisiana. However, petitioner failed to raise this issue in accordance with the Louisiana law and at too late a stage in the proceedings.

Admittedly the question posed by petitioner was first sought to be raised in this action in the form of an application for a rehearing in the Louisiana Court of Appeal for the Second Circuit (R. 160, p. 6 of Petition for Writ).

This suit was originally instituted in a State Court of the State of Louisiana and was tried by jury at the request of petitioner. Liablity to petitioner was admitted by the defendant, respondent here (R. 424, 426, p. 5 of Petition for Writ). Considering the verdict of the jury exorbitant and excessive, respondent appealed to the Louisiana Court of Appeal for the Second Circuit seeking a reduction in the award of the jury. As correctly stated in the petition for writs on pages 3 and 4 thereof, Louisiana appellate courts review the facts as found by the trial court, sitting with or without a jury, as well as the awards and may amend, affirm or reverse, and may change the awards upward as well as downward. Appellate courts in Louisiana may, and frequently do, make awards when they have been totally denied by the trial court or jury.(1)

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(1) *Baughman v. Wells*, 171 So. 2d 759.

Since liability was admitted in this case, the appeal by respondent to the Louisiana Court of Appeal was and could have been only on the question of whether the award made by the jury was excessive and exorbitant. No other issue was presented at the trial.

Under Louisiana law constitutional questions *must* be raised by proper pleading in the trial court. Constitutional questions may not be raised for the first time on appeal and certainly not for the first time upon application for rehearing in the Appellate Court.

> *Allopathic State Board v. Fowler*, 50 La. Ann. 1358, 24 So. 809;
>
> *Succession of Fachan*, 179 La. 333, 154 So. 15;
>
> *Stovall v. City of Monroe*, 199 La. 195, 5 So. 2d 547;
>
> *Long v. Northeast Soil Conservation District*, 226 La. 824, 77 So. 2d 408.

There were a number of ways in which a constitutional question could have been properly raised.

Since the appeal was solely on a question of quantum petitioner could have raised the question by an objection in the Trial Court to the allowance of the appeal, either by written motion or verbal objection, since appeals in the Louisiana State Court system, although a matter of right in cases such as this, must be requested of and allowed by the trial Judge. She could have, in the event of an overruling of the objection to the appeal by the

trial Court, properly filed motion in the Court of Appeal to dismiss the appeal. Other methods were open to petitioner but she failed to avail herself of any of them and, as above shown, first sought to raise the constitutional question on application for a rehearing to the Appellate Court.

II.

The petition for writ in this case (p. 1 thereof) seeks a writ of certiorari to review the judgment and decree of the Supreme Court of Louisiana. The Supreme Court of Louisiana did not decide this case. The decision in this case is by the Louisiana Court of Appeal for the Second Circuit. The Supreme Court of Louisiana simply denied a writ of certiorari to review the decision of the Court of Appeal (R. 2, p. 1 of Petition for Writ). The record in this case has never been before the Supreme Court of Louisiana.

The petition for writ in this Court, since the Supreme Court of Louisiana has never decided any issue in this case, should have been directed to the Louisiana Court of Appeal for the Second Circuit. *Chicago and Eastern Ilinois Railroad Company v. Industrial Commission of Illinois*, 284 U.S. 296, 76 L. ed 304, 52 S. Ct. 151. Therein this Court stated:

> "The State Supreme Court, in the exercise of its discretion, declined to review the judgment; and the case is properly here on certiorari to the state circuit court."

III.

Tersely stated, petitioner contends that the present civil jury system permitting appeals on the facts and awards is not in keeping with Amendment VII to the Constitution of the United States and, therefore, under the due process clause of the Fourteenth Amendment the entire civil jury system in Louisiana is illegal and that it must be replaced with the common law jury system requiring civil jury trials in which a unanimous verdict of twelve is necessary on the facts and that such findings are beyond judicial review. Civil juries in Louisiana must be petitioned for not later than ten days after the service of the last pleading[2] and only nine of twelve jurors must concur in order to render a verdict.[3] The contention is illusory and contrary to an impressive line of decisions by the Supreme Court of the United States.

The first case in which there was directly considered the applicability of the Seventh Amendment to the states was *Edwards v. Elliot*, 88 U.S. 487, 21 Wall. 532, 22 L. ed 487, which dismissed the contention with the remark: "that it does not apply to trials in the State Courts." In 1876, just a few years after the adoption of the Fourteenth Amendment, the Supreme Court of the

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(2) Article 1732 of the Louisiana Code of Civil Procedure, which reads "A party may demand a trial by jury of any issue triable of right by a jury in a pleading filed not later than ten days after the service of the last pleading directed to such issue."

(3) Article 1795 of the Louisiana Code of Civil Procedure, which provides "In order to render any verdict, nine of the jurors must concur therein . . . . . ."

United States decided *Walker v. Sauvinet*, 92 U.S. 678, 2 Otto 90, 23 L. ed 678, in which was considered the applicability of the Seventh Amendment as it might relate to the states. After a jury trial, requested by the defendant, a mistrial resulted, and the matter was taken up on a writ of error. The Court definitely decided that the Seventh Amendment relates only to trials in the Courts of the United States and the various states, so far as the Seventh Amendment is concerned, are left to regulate trials in their own Courts in their own way. The Court further concluded that a trial by jury in suits at common law pending in the State Court is not a privilege or immunity which the states are forbidden by the Fourteenth Amendment to abridge.

Under the decision of the Supreme Court in Walker a state has the power to eliminate civil jury trials completely, and, since the greater includes the lesser, a state may provide for jury trials with such qualifications as it may deem appropriate. Louisiana has, in its wisdom, provided for fact review since 1816 when the Supreme Court of Louisiana first announced the validity of the principle in *Abat v. Doliolle*, 4 Mart. (O.S.) 316.

Louisiana does not stand alone in the nation as the only state which allegedly does violence to the Seventh Amendment. There are decisions respecting the laws of other states in which the holdings have followed the principles announced in Walker v. Sauvinet.

The Supreme Court of the United States decided in *New York Central Railroad Company v. White*, 243 U.S.

188, 61 L.ed 667 that an attack made on the workmen's compensation finding in New York without a jury, on the ground that a jury trial had been denied as guaranteed by the Seventh Amendment, was lacking in merit. The Court cited its previous opinion in Walker. Hence, with regard to workmen's compensation cases the rule was established and has continued to date that a trial by jury in a State Court, with strict observance of the Seventh Amendment, is not a fundamental guarantee under the Federal Constitution.

In *Curtis v. United States*, 262 U.S. 215, 67 L. ed 956 in which the validity of land patents determined by the California Courts came under fire on the charge that a jury trial in the State Courts of California contravened the Seventh Amendment, the Supreme Court of the United States decided that the deprivation of the right to trial by jury in a State Court does not deprive the parties of due process of law under the Federal Constitution.

Hardware Dealers Mutual Fire Insurance Company v. Glidden Company, 284 U.S. 151, 76 L. ed 214 involved an action in the Minnesota State Courts to recover an amount awarded in favor of an insured under a damage arbitration clause in a fire insurance policy on the ground that a jury trial was denied under the Seventh Amendment. The Court again decided that the proceedings were not controlled by the Seventh Amendment and such proceedings did not constitute a denial of due process under the Fourteenth Amendment.

Hence, it appears that for almost an entire century under an unbroken line of decisions by the Supreme Court of the United States there has been a consistent denial of any contention that a litigant in a Court of any state of the United States is entitled to a civil jury trial as that right existed under the common law in 1776.

The civil jury is not an immutable or indispensable adjunct in the administration of justice in America or anywhere else. It is not grounded upon any moral precept. It does not compare, even remotely, with the inherent rights of American citizens to life, liberty and the pursuit of happiness as set forth in the Declaration of Independence. Intrinsically it is not a basic right such as freedom of religion and speech and the concept of private property and personal freedom.

The only reason for civil juries in America is that England had them in 1776. Since England has virtually exterminated them,(4) civil juries continue to exist in America solely as a result of usage dating back to accidental adoption in 1776.

The civil jury exists only in America among the world's legal institutions. Much has transpired in the use of the civil jury since 1776 in Anglo-American law.

In many states and in the Federal Government, the civil jury system has been modified over its form as

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(4) Hubert, "Trial by Jury under the New Code of Civil Procedure" (La), 35 Tulane L. Rev. 520; Sarpy, "Civil Juries", 11 Loy. L. Rev. 243.

it existed at common law in 1776. For example, in Minnesota and New Jersey, a verdict by 10 of 12 prevails; in Arkansas and New Mexico 9 of 12, as in Louisiana, and in Virginia and Montana 8 of 12;(5) thus departing from the traditional unanimous verdict of the common law which has now been scrapped in England.

The precise origin, almost a thousand years ago, of the civil jury in English history is shrouded in mystery and the object of obscure speculation.(6)

De Tocqueville wrote a century and a half ago "Democracy in America," Vol. 1, p. 285: "When the English adopted trial by jury they were a semi-barbarous people; they all became, in course of time, one of the most enlightened nations of the earth; and their attachment to this institution seems to have increased with this increasing cultivation."

It thus appears that the civil jury was invented to overcome a condition of semi-barbarity in England, which perhaps continued on into early colonial days in the new world, at least in part.

The early views of Madison, Williamson, Randolph, Graham, Ellsworth, Mason, King, Richard Henry Lee, Wilson and others, framers of the Constitution which led to the adoption of the Seventh Amendment, are the subject of a recent and comprehensive law review article(7) Ham-

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(5) "Right of Trial by Jury", 15 DePaul L. Rev. 398.

(6) Ibid.

(7) Henderson "The Background of the Seventh Amendment", 80 Harvard Law Rev. 289.

ilton also expressed his grave doubts as to the efficacy of the civil jury[8] and observed that security of liberty is materially concerned only in the trial by jury in criminal cases.

It is difficult, if not impossible, to pinpoint any one event as the motivating cause for civil juries. It is true that judges were not the trained and educated jurists we have today and recourse was had to a group of peers. If that be a reason for the establishment of the civil jury, the reason no longer exists.

The language of the Seventh Amendment "in suits at common law" scarcely defines what it means. Traditionally, to seek some light there must be an examination of the difference between law, equity and admirality as they exsted in 1776 when there were separate courts of law and equity. There is no mathematical formula although the problem was tackled several years ago by Professor Fleming James of Yale University,[9] who concluded that there is no resolution. A brief survey of some pertinent innovations in American law since 1776 is significant because the development of the private corporation and the administrative appendages of our government, both Federal and State, have changed the original concept of "suits at common law" in so many respects

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(8) 12 Lodge, "The Works of Alexander Hamilton", 305 (2d ed. 1903).

(9) James, "Right to a Jury Trial in Civil Actions", 72 Yale Law Journal, 655.

that it is difficult to recognize the expanse of this gray area which becomes more obscure as time passes.

In the Federal System perhaps the first departure was the Interstate Commerce Act (49 U.S.C. 1) which created the Interstate Commerce Commission, a century after the Constitution was adopted and which virtually stripped the Courts of jurisdiction over much railroad litigation and eliminated many civil juries in "suits at common law." Next came the National Bankruptcy Act of 1898 (11 U.S.C. 1) which placed the administration of that act for most part under the aegis of referees and again juries were eliminated in suits by creditors in "suits at common law."

The Federal Trade Commission Act of 1915 (15 U.S.C. 41) clearly eliminated civil juries and the Railroad Employees Act placed damage claims under a commission so that no civil juries could be had. The Longshoremen's and Harbor Workers' Act *(33 U.S.C. 901)* effectively eliminated civil juries in claims before the Deputy Commissioners. New juryless Courts were established, such as the Court of Claims, the Tax Court and the Customs Court. Yet no one today seriously contends that the right to a jury trial at common law has rendered any of these Federal Agencies unconstitutional. Additionally, in the various states, we find juryless Compensation Commissions and Small Claims Courts with jurisdiction in excess of the Twenty Dollars referred to in the Seventh Amendment.

The "suits at common law" expression has been emasculated in a little less than two centuries to the point that no one knows what it really implies as a matter of law.

In the past decade much has been written on the civil jury. Chief Justice Arthur J. Vanderbilt led off with his treatise, "Judges and Jurors", and over twenty law review articles followed which New York University Professor Delmar Karlen, Secretary of the Institute of Judicial Administration, has industriously grouped together for convenience in his 1965 article "Can a State Abolish the Civil Jury?"(10)

Since it would seem to be settled that due process of law does not require a trial by jury in civil cases at all, it clearly follows that the right to an appeal may be circumscribed in such manner as the wisdom of the several states may indicate. An appeal under the common law was unknown. Due process is satisfied by one hearing. The right of appeal or review is not essential to due process.

> *District of Columbia v. Clawans*, 300 U. S. 617, 81 L. ed 843;
>
> *National Union of Marine Cooks & Stewards v. Arnold*, 348 U. S. 37, 99 L. ed. 46, 51.

As stated by this Court in the latter case: "While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process."

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(10) 1965 Wisc. Law Review 103

Louisiana, in granting the *right* of appeal thus went further than the common law. It is a right granted equally to plaintiff and defendant. It frequently results in awards being given plaintiff by the appellate court and by awards being increased.(11)

Appellate review in Louisiana is not a one-way street. The Appellate Courts of Louisiana may not only reduce an award made by a civil jury or a judge, sitting without a jury, but may, and often do, increase such awards as the appellate court may consider proper, as will be seen from the Fulco and Sumrall cases cited under footnote 11.

CONCLUSION

During its October, 1966 term, the Supreme Court of the United States has denied certiorari in two Louisiana State Court matters in which similar complaints were advanced against the validity of judicial review.(12)

It is respectfully submitted that the application for writ in this case should be denied.

Respectfully submitted,

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(11) *Baughman v. Wells*, 171 So. 2d 759 (no award by jury); *Fulco v. Lumbermens Mut. Cas. Co.*, 110 So. 2d 871; *Sumrall v. Aetna C. & S. Co.*, 124 So. 2d 168 (jury awards increased).

(12) No. 174, *Sule v. Missouri Pacific Railway Co.*, 17 L. Ed. 2d 58 and No. 388, *King v. Vico Insurance Co.*, 17 L. ed 2d 73.

CERTIFICATE

I, the undersigned member of the Bar of this Court, do hereby certify that a copy of the above and foregoing brief in opposition to application for writ of certiorari has been served upon the petitioner herein, by depositing the same in the United States mail, with adequate postage prepaid thereon, addressed to Mr. Robert B. Neblett, Jr. and Mr. Leonard Fuhrer, 602 Murray Street, Alexandria, Louisiana, and to Mr. Samuel C. Gainsburgh, 1718 National Bank of Commerce Building, New Orleans, Louisiana, her attorneys, this the 28 day of Sept., 1967.

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COUNSEL